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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARQUESE DESEAN BROWN, Defendant and Appellant.	B223834 (Los Angeles County Super. Ct. No. MA041142)

APPEAL from a judgment of the Superior Court of Los Angeles County. Hayden A. Zacky, Judge. Modified, remanded and affirmed.

Jeralyn Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Steven D. Matthews and Susan S. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Appellant Marquese Desean Brown appeals from the judgment entered upon his conviction by jury of three counts of assault with a firearm (Pen. Code, § 245, subd. (a)(2), counts 1, 2 and 3),[1] one count of shooting at an inhabited dwelling (§ 246, count 4), one count of second degree murder (§ 187, subd. (a), count 5), and one count of shooting at an occupied vehicle (§ 246, count 6). With respect to counts 1, 2, 3, and 6, the jury found true the allegations that appellant personally used a firearm (§ 12022.5, subd. (a)), and also with respect to count 1, that appellant inflicted great bodily injury (§ 12022.7, subd. (a)). The jury also found true firearm-use enhancements within the meaning of section 12022.53 with respect to counts 4 (§ 12022.53, subd. (d)), 5 (§ 12022.53, subds. (b)-(d)), and 6 (§ 12022.53, subds. (b) and (c)). With respect to all counts, the jury found true the allegation that the offenses were committed for the benefit of a criminal street gang with the specific intent to promote criminal conduct by gang members. (§ 186.22, subd. (b).) The trial court sentenced appellant to a total state prison term of 128 years to life.

Appellant raises a number of sentencing errors, specifically contending that the trial court: (1) imposed an incorrect sentence described in section 245, subdivision (b) on counts 1, 2, and 3; (2) improperly enhanced appellant's sentence on counts 1, 2, and 3 under both sections 186.22, subdivision (b)(1)(C), and 12022.5, subdivision (a); (3) improperly enhanced appellant's sentence on count 4 under section 12022.53, subdivisions (b) and (c); and (4) improperly sentenced appellant under section 186.22 on count 6, and improperly enhanced the sentence under section 12022.5, subdivision (a).

We find merit in some of appellant's sentencing contentions and will order the judgment modified by striking certain firearm enhancements. Also, we remand for resentencing on counts 1, 2, 3, and 6 and otherwise affirm.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

BACKGROUND

Prosecution Evidence

A. August 4, 2007—Count 1

On the night of August 4, 2007, Danielle Henry hosted a party at her apartment in the City of Lancaster. Rashawn Clinkscales got a ride to the party from his cousins Eric Delery and Brandon.[2] Clinkscales did not know anyone at the party and after approximately 10 minutes went outside and waited for his cousin Harry to give him a ride home. Appellant approached Clinkscales from an alley across the street and asked him where he was from, meaning what was his gang affiliation. Appellant stated that he was from the "58 Neighborhood [Crips Gang]." Clinkscales's family was from Inglewood and belonged to the "Inglewood Families" gang. Clinkscales knew that the 58 Neighborhood Crips Gang and the Inglewood Families gangs were enemies. Clinkscales was not a gang member and replied, "I'm not from nowhere." Appellant referred to the Inglewood Families gang as "faggots" which was a derogatory term used to disrespect them. Clinkscales prepared himself for a fist fight but appellant walked away and entered Henry's apartment.

Appellant returned a few moments later with a gun and placed it against Clinkscales's head. Appellant ordered Clinkscales to say, "Fuck faggots" or he would kill him. Appellant's friend was yelling at him to put the gun down. Clinkscales walked down an alley and appellant followed him. Clinkscales heard a shot and ducked. When he looked back he saw appellant laughing and holding a gun. Clinkscales heard more shots and ran.

Shelton Battle was inside the apartment with Henry when he heard a commotion outside. He went outside after he heard the gunshots. Battle approached Clinkscales and asked if he was alright. Clinkscales had only been in Lancaster for a week and was unfamiliar with the area. Battle told him how to get to Clinkscales's father's house and

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[2] Brandon was never identified by last name.

then Battle returned to the party. As Clinkscales was walking he felt the left side of his body become numb and realized he had been shot in the back of his left leg. He called his father who took him to the hospital. He identified appellant in court as the shooter.

Battle moved away from the area after the Clinkscales shooting. At trial, he stated that if he did know who shot Clinkscales and testified for the prosecution, that would be snitching. Battle testified that he did not "believe in snitching on nobody."

B. August 5, 2007—Counts 2, 3, 4, and 6

The following night, August 5, 2007, a group of people gathered at the Henry apartment in the City of Lancaster. Henry was not present and asked Jazelyn Whitespeare to look after her cats while she was away. Whitespeare invited her friend Tatiana Horton to come over to the house. Others present included Lajoi Davis and her friend Battle, both members of the Black Menace Mafia gang. Sometime later, appellant accompanied by Myisha Harbour and her boyfriend Quinton Ingram, joined the party. Harbour took a gun from her purse and handed it to appellant, who tucked it into his sock or shoe.

An altercation developed outside on the street between appellant and Eric Delery. Appellant and Delery were members of rival gangs. Appellant was a member of "TAF"[3] and the 58 Neighborhood Crips gang. Delery was a member of the Inglewood Families gang associated with the Bloods. Delery told appellant he did not get along with "NAPS" meaning anyone from the 58 Neighborhood Crips gang. Davis approached appellant and Delery and told them to stop arguing because they were going to draw the attention of the police. Appellant pulled out a gun, pointed it at Davis's face and said, "Bitch, I'll blow your head off." While appellant's attention was focused on Davis, Delery got in his car and drove away. Appellant realized Delery was getting away and ran after him. He fired three shots at the car as Delery drove away.

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[3] TAF was a relatively new small gang formed in the Antelope Valley that was not aligned with either the Crips or the Bloods.

Whitespeare and Horton had been standing in the doorway of the apartment observing the incident. Davis and some others who had been outside ran back into the apartment when the shooting started. Appellant, along with Harbour, Ingram and a few others remained outside. Appellant threw a flowerpot through the window of the apartment. Inside the apartment, the lights were turned off and everybody huddled in the back room. Four to five shots hit the apartment. A few minutes after the shooting ended the lights were turned back on and Davis became aware of blood gushing out of her back and realized she had been shot. Davis was hospitalized overnight and treated for a gunshot wound to the right side of her spine in the mid-back area.

Delery, who was in custody and physically restrained,[4] refused to testify at trial. Delery had previously testified that he had gotten into an argument with a person on the street who had pulled a gun and pointed it at him. Delery then drove away. Delery also told Los Angeles County Sheriff's Detective David Gunner that he was concerned about testifying in court.

C. September 9, 2007—Count 5

On September 9, 2007, Armando Escamilla was visiting his friend Nancy Burrion at her home on Rodin and Avenue H-14 in the City of Lancaster. At approximately 11:00 p.m. that night, Escamilla and Burrion were sitting in his car in the front driveway of Burrion's home. Escamilla noticed a group of people standing outside a residence about three houses down the street. Eduardo Perez came out of a house across from where Escamilla was parked and walked down the street in the direction of where the group of people were gathered. Burrion and Escamilla heard three or four gunshots. After the shots were fired, three or four males ran down the middle of the street past Escamilla's car, jumped over a wall and disappeared.

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[4] The prosecutor represented in his opening statement that Delery was serving a life sentence for attempted murder. The court made a legal finding that Delery was unavailable as a matter of law pursuant to Evidence Code section 240, and allowed the parties to read Delery's testimony from the preliminary hearing.

Perez came stumbling up the street and collapsed in the front yard of the same house from which he had earlier left. Burrion realized he had been shot and ran across the street to help him. Perez was choking as he lay on the ground. He was transported to Antelope Valley Hospital and died a few hours later. An autopsy determined that Perez had suffered a number of gunshot wounds. The fatal wound occurred when a bullet entered his left tricep and passed through his left lung, heart, right lung, and exited through his right chest.

D. Police Investigation

Detective Gunner, who was assigned to investigate the August 4, and August 5 shootings, interviewed Clinkscales and showed him a photographic six-pack. Clinkscales circled appellant's photograph and identified him as "the guy who shot me." After the shootings, Battle moved to Moreno Valley and Detective Gunner contacted him by telephone. Battle told Detective Gunner that: he witnessed the shooting of Clinkscales; appellant was the person who shot Clinkscales; appellant and Clinkscales had gotten into an argument; Clinkscales walked away; appellant pulled a gun and fired several shots at Clinkscales as he walked toward an alley.

Detective Gunner inspected Henry's apartment and noted the bullet holes in the window blinds, the walls, and doors. Henry referred Detective Gunner to Tatiana Horton. Horton was shown a series of photographic six-packs. She identified appellant from one set and Ingram from another. Whitespeare was also shown some photographic six-packs and she identified appellant, Ingram, and Harbour. Davis was contacted and identified appellant as the person who had held the gun to her face and threatened to kill her. She saw appellant with the gun in his hand run towards Delery as he was leaving in his car. She heard the gunshots as she ran back into the apartment. Delery was uncooperative but did acknowledge that he and appellant had an argument. He stated that he got in his car to leave and appellant shot at the car.

Lancaster Sheriff's Deputy Dale Parisi was part of the "LANCAP" team which was assigned to quell violence and narcotics transactions in apartment complexes in the

City of Lancaster. On September 18, 2007, he was driving a marked patrol car in the area of Rodin and Avenue H-14 when he saw appellant standing in the middle of the road. Appellant gave permission to search his nearby residence on Rodin. In the residence's backyard a plastic bag was discovered that had been buried in a loose dirt area. Inside the bag was a .38-caliber revolver and 14 rounds of live ammunition.

Appellant was taken into custody and advised of his *Miranda*[5] rights. Appellant stated that he was from the 58 Neighborhood gang in Los Angeles, and went by the name "Slim." He also stated that he associated with the TAF gang when he was in the Antelope Valley, and used the gang moniker, "Chunkems."

Los Angeles County Sheriff's Deputy Edmund Anderson was a firearms identification expert. He compared a fired bullet that was removed from Perez's body by the coroner's office with the revolver recovered at appellant's residence. He concluded that the bullet recovered from Perez had been fired from the revolver.

On January 10, 2008, appellant was advised of his *Miranda* rights and interviewed by Detectives Dameron Peyton and Margarita Barron. Appellant waived his rights and admitted he fired the gun but claimed Perez was also armed.

E. Gang Evidence

Appellant identified himself as a member of the 58 Neighborhood Crips gang and the TAF gang. He admitted using the monikers, "Little Knuckles," "Slim," "BK Slim," "Little Chunkems," and "Chunkems." Appellant had several gang tattoos including a "58" on his left hand, and a large "E" on his right shin which was consistent with 58 Neighborhoods because it corresponds with the "E" in "Eight."

Los Angeles Police Officer Steven Sieker was called as the prosecution's expert on the 58 Neighborhood Crips gang. He testified that the 58 Neighborhood Crips gang had about 50 members and operated primarily in Los Angeles. In 2007, many members of the gang moved to Palmdale and Lancaster because the area offered more affordable

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5 *Miranda v. Arizona* (1966) 384 U.S. 436.

housing. The primary activities of the 58 Neighborhood Crips gang included assaults with deadly weapons, drive-by shootings, robberies, burglaries, carjacking, murder, and possession of concealed weapons.

Officer Sieker testified that appellant was a member of the 58 Neighborhood Crips gang based on his review of the field identification cards in which appellant admitted membership, and the tattoos on appellant's body. Further support was provided by the circumstances surrounding the shootings on August 4, 2007, and August 5, 2007. It was common knowledge that the Crips and Bloods gangs were mortal enemies. Appellant claimed the moniker "BK Slim" which referred to "Blood Killer." Appellant shot at Clinkscales because Clinkscales told him his family was affiliated with the Inglewood Families gang, and shot at Delery who claimed membership in the same known Bloods gang.

In response to a series of hypothetical questions based on the facts of the shootings on August 4, 2007, and August 5, 2007, Officer Sieker opined that the shootings were done to benefit the 58 Neighborhood Crips gang. The Clinkscales shooting was a violent act against someone claiming family membership in a rival gang. Delery's shooting involved a relative of Clinkscales, who claimed actual membership in a rival gang and stated that he did not get along with any Crips gang members. Davis's shooting was a violent retaliatory act because shortly before running into the apartment Davis had intervened in the altercation between appellant and Delery, enabling Delery's escape. Officer Sieker opined the shootings would serve a number of purposes, in that they would: enhance the reputation of the 58 Neighborhood Crips gang by creating fear of, and respect for the gang; enhance appellant's reputation within his gang; and dissuade any possible witnesses from cooperating or testifying.

Detective Gunner's background involved training and experience in criminal street gangs and he also testified as a prosecution gang expert. Appellant admitted to Detective Gunner that he was a member of the TAF gang and during the search of appellant's residence on September 18, 2007, letters with TAF gang writing associated

with appellant were found. TAF was a new gang with approximately 40 members and was comprised mostly of African-American youths, some of whom belonged to gangs in Los Angeles. Their primary activities included assaults of other gang members, street robberies, and graffiti. Their enemies included the Black Menace Mafia gang and Hispanic gangs.

Detective Gunner was aware that Delery claimed he was from the Black Menace Mafia gang and the Inglewood Family gang because it was common for a person to claim membership in two gangs while in the Antelope Valley. Lajoi Davis was also a member of the Black Menace Mafia gang. Quinton Ingram was a member of the TAF gang. Detective Gunner testified that appellant was a TAF member based on his investigation, his discussions with other detectives and gang members, his review of field identification cards, appellant's admission, and the recovery of gang-related items from appellant's house.

Detective Gunner opined that appellant's shooting at the Henry apartment, where Davis had run to on August 5, 2007, benefitted the TAF gang in addition to the 58 Neighborhood Crips gang. Detective Gunner learned that Perez was a member of the MTC gang and in September 2007, the MTC and TAF gangs were fighting. Being a new smaller gang, an assault on enemy gang members helped build TAF's reputation and helped recruit new members. Responding to a hypothetical based on the facts of this case, Detective Gunner opined that appellant's shooting of Perez, an MTC gang member, would benefit the TAF gang by enhancing its reputation and instilling fear in the community.

Defense Evidence

Appellant's uncle, James Culver, lived with appellant in the City of Lancaster. Around 7:00 p.m. on September 9, 2007, Culver was standing in his front yard. Appellant and approximately 10 others were shooting dice in a vacant lot across the street. Perez, who was drinking a beer, approached the group shouting racial epithets. Perez told the group of African-Americans, "When I get back, if you guys out here,

there's going to be problems." About 15 minutes later, Perez returned with two Hispanic males who were carrying knives. Perez drew a gun from his pocket and fired two shots at appellant. Appellant ducked behind a car and returned fire at Perez, striking him. The people in the area started running and Culver went inside his residence.

DISCUSSION

I. Contentions

Appellant contends the trial judge failed to adhere to the relevant statutes and imposed an unauthorized sentence. Specifically, appellant contends the trial court: (1) improperly sentenced appellant on counts 1, 2, and 3 under section 245, subdivision (b), when appellant was convicted of violating section 245, subdivision (a); (2) improperly enhanced appellant's sentence on counts 1, 2, and 3 under both sections 186.22, subdivision (b)(1)(C), and 12022.5, subdivision (a), when only one enhancement was appropriate; (3) improperly enhanced appellant's sentence on count 4 under section 12022.53, subdivisions (b) and (c) because these violations were not alleged in the amended information or found true by the jury; and (4) with respect to count 6, improperly relied on the alternate sentencing scheme in section 186.22, subdivision (b)(4), and improperly enhanced the sentence under section 12022.5, subdivision (a) because the amended information did not allege those violations.

II. Applicable Principles

As a general rule, only "claims properly raised and preserved by the parties are reviewable on appeal." (*People v. Scott* (1994) 9 Cal.4th 331, 354 (*Scott*).) But, a narrow exception to the waiver rule exists for "'unauthorized sentences' or sentences entered in 'excess of jurisdiction.'" (*People v. Welch* (1993) 5 Cal.4th 228, 235 (*Welch*).) Sentences which "could not lawfully be imposed under any circumstance[s]" (*Scott, supra*, at p. 354) are reviewable "regardless of whether an objection or argument was raised in the trial court and/or reviewing court." (*Welch, supra*, at p. 235.) Appellate

intervention is appropriate when the errors present pure questions of law and are clear and correctable independent of any factual issues presented by the record at sentencing. (*Scott, supra*, at p. 354)

When a court pronounces a sentence which is unauthorized by the Penal Code, that sentence must be vacated and a proper sentence imposed whenever the mistake is appropriately brought to the attention of the court. (*People v. Massengale* (1970) 10 Cal.App.3d 689, 693.)

"When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury." (§ 1170.1, subd. (f).)

Section 1170.1, subdivision (e) states, "All enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact."

III. Sentencing Errors on Counts 1, 2, and 3

A. Factual Background

By amended information filed February 24, 2010, the Los Angeles County District Attorney alleged, among other things, that appellant committed three counts of assault with a semi-automatic firearm in violation of section 245, subdivision (b). Count 1 upon Rashawn Clinkscales on August 4, 2007, count 2 upon Eric Delery on or about August 5, 2007, and count 3 upon Lajoi Davis, also on or about August 5, 2007. It was further alleged that appellant personally used a firearm (handgun) within the meaning of section 12022.5, subdivision (a), and that the offenses were committed for the benefit of a criminal street gang with the specific intent to promote criminal conduct by gang members in violation of section 186.22, subdivision (b)(1)(C).

Outside the presence of the jury after they had been instructed with CALCRIM No. 875,[6] the trial court stated, "Let me just explain one thing on the record here. The instructions I gave, I think it was instruction 875, deals with 245(a)(2), and that's because based on the evidence presented at trial, there was no evidence that a semi-automatic firearm was used. Myself and the attorneys discussed that. So that's why we added that instruction."

On counts 1, 2, and 3, the jury found appellant guilty of assault with a firearm in violation of section 245, subdivision (a)(2), and found true the firearm enhancement pursuant to section 12022.5, subdivision (a), and the gang allegation pursuant to section 186.22, subdivision (b)(1)(C).[7]

During sentencing and while summarizing the jury's findings, the court stated, "Just to summarize, the defendant was convicted of six separate counts. Count 1, 2 and 3, for violation of 245(b) of the Penal Code, assault with a semi-automatic firearm." On

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[6] The jury was instructed with CALCRIM No. 875 as follows: "The defendant is charged in Counts 1, 2, and 3 with assault with a firearm. [¶] To prove that the defendant is guilty of that crime, the People must prove that: [¶] 1. The defendant did an act with a firearm that by its nature would directly and probably result in the application of force to a person; [¶] 2. The defendant did that act willfully; [¶] 3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; [¶] and [¶] 4. When the defendant acted, he had the present ability to apply force with a firearm to a person. [¶] Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage. [¶] The People are not required to prove that the defendant actually intended to use force against someone when he acted. No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault, and if so, what kind of assault it was. [¶] The following term, *firearm*, is defined in another instruction to which you should refer."

[7] A great bodily injury enhancement pursuant to section 12022.7, subdivision (a), was not alleged in the amended information but was submitted to the jury and found to be true with respect to count 1.

count 1, the court sentenced appellant to a consecutive term of 23 years consisting of the upper term of nine years pursuant to section 245, subdivision (b), plus 10 tears pursuant to section 186.22, subdivision (b)(1)(C), plus four years pursuant to section 12022.5, subdivision (a). In imposing 20 year concurrent terms on counts 2 and 3, the court selected the midterm of six years pursuant to section 245, subdivision (b), plus the 10 and four-year enhancements pursuant to sections 186.22, subdivision (b)(1)(C), and 12022.5, subdivision (a), respectively.

B. Resentencing is Required on Counts 1, 2, and 3 in Accordance with Section 245, Subdivision (a)

Appellant contends that the trial court imposed an unauthorized sentence. The People agree with this contention, as do we. Although appellant was convicted in counts 1, 2, and 3 of assault with a firearm, pursuant to section 245, subdivision (a)(2),[8] the trial court imposed sentence pursuant to section 245, subdivision (b).[9] The sentence imposed by the trial court constituted an "'unauthorized sentence'" (*Scott, supra*, 9 Cal.4th at p. 354) and remand for resentencing is required. (*Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, 1255.)

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[8] Section 245, subdivision (a)(2), states: "Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for *two*, *three*, or *four years*, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars ($10,000) and imprisonment." (Italics added.)

[9] Section 245, subdivision (b), states: "Any person who commits an assault upon the person of another with a semiautomatic firearm shall be punished by imprisonment in the state prison for *three*, *six*, or *nine years*." (Italics added.)

C. Appellant's Sentence Violates Section 1170.1, Subdivision (f)

Appellant contends, and the People agree, that the trial court's imposition of both the four-year term for the firearm use enhancement (§ 12022.5, subd. (a)),[10] and the 10-year term for the gang enhancement (§ 186.22, subd. (b)(1)(C))[11] on counts 1, 2, and 3 violated section 1170.1, subdivision (f). Appellant contends that the enhancement under section 12022.5, subdivision (a) must be stricken.

In *People v. Rodriguez* (2009) 47 Cal.4th 501 (*Rodriguez*), the Supreme Court held that when a defendant is convicted of a violent felony within the meaning of section 667.5, subdivision (c)(8), based on the defendant's use of a firearm under section 12022.5, a sentencing court's imposition of both the section 12022.5 enhancement and the section 186.22, subdivision (b)(1)(C) enhancement violates section 1170.1, subdivision (f). (*Rodriguez*, *supra*, at pp. 508–509.) *Rodriguez* concluded that the proper remedy was not to strike the 10-year gun use enhancement, but to reverse the judgment and remand the matter for resentencing. (*Id*. at p. 509.) The court stated, "Remand will give the trial court an opportunity to restructure its sentencing

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[10] Section 12022.5, subdivision (a), states in pertinent part: ". . . any person who personally uses a firearm in the commission of a felony . . . shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years. . . ." (§ 12022.5, subd. (a).)

[11] Section 186.22, subdivision (b)(1)(C), states: "(b)(1) Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows: [¶] . . . [¶] (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years." (§ 186.22, subd. (b)(1)(C).)

choices in light of our conclusion that the sentence imposed here violated section 1170.1's subdivision (f)." (*Ibid.*)

Similarly here, pursuant to *Rodriguez*, the court's imposition of both the four-year firearm enhancement (§ 12022.5, subd. (a)), and the 10-year gang enhancement (§ 186.22, subd. (b)(1)(C)) violated section 1170.1, subdivision (f), and only the greatest of those enhancements may stand. The proper remedy is to reverse the trial court's sentence and remand the matter to allow the court to restructure the sentence so as to not violate section 1170.1, subdivision (f). (*Rodriguez, supra*, 47 Cal.4th at p. 509.)

On remand for resentencing, one issue remains on which the parties do not agree. Appellant contends that the trial court cannot rely on the jury finding of great bodily injury pursuant to section 12022.7 to enhance the sentence on count 1, because the allegation was not included in the amended information. The People counter that appellant had adequate notice and that the claim is forfeited because appellant failed to object during trial when the jury was given CALCRIM No. 3160 regarding this allegation, and again failed to object when the jury found the allegation true.

The verdict form submitted to the jury on count 1 included an allegation under section 12022.7, subdivision (a) that appellant "personally caused great bodily injury to Rashawn Clinkscales, within the meaning of Penal Code Section 12022.7(a)." The jury was instructed with CALCRIM No. 3160 which in pertinent part stated: "If you find [appellant] guilty of the crime charged in Count 1, you must then decide whether the People have proved the additional allegation that [appellant] personally inflicted great bodily injury on Rashawn Clinkscales in the commission of that crime." The jury found the great bodily injury enhancement pursuant to section 12022.7, subdivision (a) to be true.

Due process requires that appellant receive adequate notice of the nature of the accusation against him and an opportunity to be heard. (*Cole v. Arkansas* (1948) 333 U.S. 196, 201.) The purpose of the due process notice requirement is to afford appellant ""'a reasonable opportunity to prepare and present his defense and not to be taken by

surprise by evidence offered at his trial." [Citation.]' [Citation.]" (*People v. Lohbauer* (1981) 29 Cal.3d 364, 368.) The same principles apply to sentence enhancements. (*People v. Mancebo* (2002) 27 Cal.4th 735, 747 (*Mancebo*).)

In *Mancebo,* the defendant was charged with and convicted of numerous sex crimes. The People also alleged certain circumstances that would bring the defendant under the harsher penalty scheme of the One Strike law. The sex crime convictions involved more than one victim. In addition, one of the circumstances charged and found true by the jury to support the One Strike sentence was a gun use. The gun use was also alleged as a separate enhancement under section 12022.5. At sentencing, the court realized that it could not use the same gun use in each count as a circumstance to impose a One Strike sentence and also to increase the defendant's sentence for the same gun use under section 12022.5. The trial court substituted as a circumstance to support the One Strike sentence the circumstance that defendant was convicted of offenses against more than one victim. This circumstance can be used under section 667.61, but the information did not expressly allege this circumstance. (*People v. Mancebo, supra*, 27 Cal.4th at pp. 738–739.)

The California Supreme Court in *Mancebo,* found that the trial court could not substitute the multiple victim circumstance for the gun use circumstance as a means to impose the One Strike sentence because it was never pled, even though the elements necessary to establish it were implicit in the information that contained counts with more than one victim and the jury convicted defendant of sex crimes regarding more than one victim. The punishment for the gun use enhancement under section 12022.5 had to be stricken because without the multiple-victim circumstance the court had to rely on the gun use circumstance to impose the One Strike sentence.

"The problem in *Mancebo*, the court explained, was not in the lack of proof but in the lack of notice. The trial court could not wait until the time of sentencing to decide what enhancements were necessarily established by the jury's verdicts. '[A] defendant has a cognizable due process right to fair notice of the specific enhancement allegations

that will be invoked to increase punishment for his crimes.' Fair notice, the court explained may be critical to the defendant's ability to contest the factual bases for the enhancement. Furthermore, a defendant's decision whether to plea bargain or go to trial will often turn on the extent of exposure to a lengthy prison term. The defendant would have less incentive to plea bargain if he did not know up front what enhancements the prosecution intended to seek. Finally, section 1170.1, subdivision (e) requires all enhancements must be 'admitted by the defendant in open court or found to be true by the trier of fact.' The court pointed out that unless the prosecution makes known in advance what enhancements it intends to invoke 'there would be nothing for the defendant to "admit" in open court.'" (*People v. Riva* (2003) 112 Cal.App.4th 981, 1002, fns. omitted; see also *People v. Arias* (2010) 182 Cal.App.4th 1009, 1019.)

As filed, the amended information did not include the section 12022.7 allegation. No request was made to amend the information to include the required allegation, and nothing in the record suggests the information was ever amended. Nevertheless, the trial court instructed that if the jury found appellant guilty of assault on count 1, it must make a separate determination of whether the prosecution proved that appellant inflicted great bodily injury on Clinkscales. The statute is explicit and requires that the enhancement be alleged in the pleading. (§ 1170.1, subd. (e).) As in *Mancebo*, while there was no lack of proof on the issue and the jury's verdict supported the finding, appellant did not receive the fair notice required by this section.

People v. Riva, supra, 112 Cal.App.4th 981 does not alter this decision. In *Riva*, the defendant was charged with numerous crimes. (*Id.* at p. 986.) In addition, it was alleged as to two counts that he discharged a firearm pursuant to section 12022.53, subdivision (d).[12] (*Riva, supra,* at p. 1000.) This allegation was not made as to a third

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[12] Section 12022.53, subdivision (d), states in pertinent part: ". . . any person who, in the commission of a felony . . . personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life."

count. (*Ibid*.) The jury was asked to return a finding as to all three counts whether the allegations under section 12022.53, subdivision (d) were true. (*Riva, supra,* at p. 1000.) The jury found the allegations to be true as to all three counts, and the trial court added the sentence for the gun allegation to the count that did not contain the enhancement in the information. (*Ibid.*)

Riva appealed, claiming the failure to plead an enhancement under section 12022.53, subdivision (d) as to the count on which the enhancement was imposed violated his right to adequate notice. Riva relied on *Mancebo* to support his position. The *Riva* court found the issue to be a close one but concluded that "imposing the section 12022.53 enhancement in this case did not violate section 12022.53, subdivision (j)[13] or Riva's right to due process of law." (*People v. Riva, supra,* 112 Cal.App.4th at p. 1002.) The court's conclusion was based on finding that the prosecutor complied with the literal requirements of section 12022.53, subdivision (j) by pleading the enhancement in other counts of the information. "Had the Legislature intended an enhancement under section 12022.53 be specifically pled as to each count the prosecution sought to enhance, it knew how to say so clearly [having done so in other sections of the Penal Code]." (*Riva, supra,* at p. 1002.) The failure to enact a requirement that the facts alleged to give rise to an enhancement shall be added to and be part of the count in question in the accusatory pleading suggested that the "Legislature did not intend to require such strict pleading requirements with respect to section 12022.53." (*Id*. at p. 1003.)

In addition, the *Riva* court found that the Supreme Court's concern in *Mancebo* over lack of fair notice was not applicable because Riva was on notice he had to defend against such a charge and it would not have "affected his decision whether to plea bargain since the other counts which did allege this enhancement obviously posed a risk

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13 Section 12022.53, subdivision (j), states in pertinent part: "For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact."

of greater punishment. Finally, we find it highly unlikely a defendant would admit in open court to an enhancement which would result in a 25-year to life sentence." (*People v. Riva, supra,* 112 Cal.App.4th at p. 1003.)

Here, the People's argument although not invoking the doctrine of implied consent as set forth in *People v. Toro* (1989) 47 Cal.3d 966 (*Toro*), disapproved on other grounds in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, footnote 3, appears to be based on that proposition.

In *Toro*, the defendant was convicted of an uncharged lesser related offense. The Supreme Court held the conviction to be valid, finding the defendant impliedly consented to the jury's consideration of the uncharged offense by interposing no objection to instructions and a verdict form recognizing that offense. (*Toro, supra,* 47 Cal.3d at pp. 969–970, 976–977.) The *Toro* court explained that "it has been uniformly held that where an information is amended at trial to charge an additional offense, and the defendant neither objects nor moves for a continuance, an objection based on lack of notice may not be raised on appeal. [Citations.] There is no difference in principle between adding a new offense at trial by amending the information and adding the same charge by verdict forms and jury instructions." (*Id.* at p. 976, fn. omitted.)

There are similarities between *Toro* and appellant's case here. Appellant approved jury instruction CALCRIM No. 3160, and verdict forms that implicitly recognized that the uncharged section 12022.7, subdivision (a) enhancement was being presented to the jury. But, there is a crucial difference. Central to the *Toro* court's holding was the recognition that "submission of lesser related offenses to the jury enhances the reliability of the fact-finding process to the benefit of both the defendant and the People . . . ." (*Toro, supra,* 47 Cal.3d at pp. 969–970, 977 ["Lesser related offense instructions generally are beneficial to defendants and in a given case only the defendant knows whether his substantial rights will be prejudicially affected by submitting a lesser related offense to the jury"].) In light of the "potential benefit to the defendant of affording the jury a wider range of verdict options" and "[t]o prevent speculation on a favorable

verdict," the Supreme Court concluded it would be "reasonable and fair" to imply consent to an implicit amendment of the information by means of adding the uncharged offense by verdict forms and jury instructions. (*Id*. at p. 976.)

The same considerations of practicality and policy from *Toro* do not apply here where the uncharged facts subjected appellant to greater liability. Nor does the exception carved out by *Riva* apply in this situation. In *Riva,* the enhancement under section 12022.53, subdivision (d) was pled by number and description as to some of the counts in the information, just not the one on which the trial court imposed it. Instead, here as in *Mancebo,* the enhancement the trial court imposed was never pled as to any count even though the elements necessary to establish it were found by the jury. Had the prosecution sought to amend the information to include the great bodily injury enhancement on count 1, the defense may well have objected. Appellant was not afforded an opportunity to present a defense and was denied due process. (*People v. Lohbauer, supra,* 29 Cal.3d at p. 368.) Given the absence of anything in the record showing an amendment—and because the defense had no apparent reason to consent to one—we decline to extend the *Toro* holding to this situation. The trial court cannot rely on the jury finding regarding the great bodily injury allegation (§ 12022.7, subd. (a)) to enhance appellant's count 1 sentence.

IV. Sentencing Errors on Count 4

A. Factual Background

Count 4 of the amended information alleged that appellant shot at an inhabited dwelling in violation of section 246. It was further alleged in connection with count 4 that appellant personally and intentionally discharged a firearm (handgun) within the meaning of section 12022.53, subdivision (d), and that the offense was committed for the benefit of a criminal street gang in violation of section 186.22, subdivision(b)(1)(C). The jury found appellant guilty of the section 246 violation and found both special allegations

to be true.[14] At the sentencing hearing, the court stated, "As to count 4, violation of 246 of the Penal Code, shooting at an inhabited dwelling, because the jury did find the allegation true under 186.22, that section, the court will impose a term of 15 years to life on that count. In addition, because great bodily injury was sustained, under 12022.53(d), the court will impose a term of 25 years to life, consecutive to the 15 years to life. Total term of imprisonment on count 4 then is 40 years to life, to run consecutive to count 5, which is the base term. An additional 20 years is imposed and stayed under 12022.53(c). An additional ten years is imposed and stayed pursuant to 12022.53(b)."

B. Section 12022.53, Subdivisions (b) and (c) Enhancements Must Be Stricken

The trial court imposed stayed sentences on count 4 under section 12022.53, subdivisions (b) and (c). Appellant contends and the People agree the sentence enhancements were in error. The allegations were not alleged in the amended information, nor were they found true by the jury as required under section 12022.53, subdivision (j). The stayed sentences imposed by the trial court constituted an "'unauthorized sentence.'" (*Scott, supra*, 9 Cal.4th at p. 354) Appellant's stayed sentence for the section 12022.53, subdivisions (b) and (c) enhancements must be stricken.

V. Sentencing Issues on Count 6

A. Factual Background

Neither the original information filed July 16, 2008, nor the amended information filed February 24, 2010, included count 6. After the presentation of evidence at trial, the prosecutor moved to add a violation of section 246, based on appellant's shooting at

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[14] It appears the reporter's transcript is in error concerning a section 12022.53, subdivision (b) allegation having been found true on count 4. The jury's verdict form indicates that a section 12022.53, subdivision (d) firearm allegation was found true as to count 4. The clerk's transcript, reflecting the jury's verdict, correctly indicates a section 12022.53, subdivision (d) allegation was found true.

Delery's vehicle as Delery drove away. In response to the court's inquiry as to whether appellant objected, his counsel replied, "I will submit it." The court noted the allegation was proved up at the preliminary hearing and granted the motion.[15] A discussion took place the following day before closing arguments commenced, concerning count 6. Appellant was present with counsel. Outside the presence of the jury, the trial court responded to an inquiry by the prosecutor and informed counsel that the personal use and discharge of a firearm allegation pursuant to section 12022.53, subdivision (c), applied to count 6. The court stated, "That would be to count 6. I am sorry. Shooting at an occupied vehicle. And I did provide counsel with a case, People versus Jones, a 2009 case, 47 Cal.4th 566, which in that case, the Court held that the 20-year enhancement pursuant to 12022.53(c) did apply to the 246. Is that correct?" The prosecutor agreed, stating, "That's correct. And it actually, the reason is because the gang allegation is also alleged, making it a life crime. Once it's a life crime, then the 12022.53 does apply."

During closing arguments the gang allegation was argued to the jury. The prosecutor argued that it was important to understand the "gang context" because it explained everything about the case and why the shootings occurred. Having summarized the gang evidence that was presented during trial the prosecutor then discussed the shootings on August 4, 2007 (count 1), and August 5, 2007 (counts 2, 3, 4, and 6). With respect to motive, the prosecutor stated, "Again, it's a gang motive. I am not going to spend any more time than I have done already on that. But we know that 58 Neighborhood Crips, when they are confronted by rival gang members and disrespected, that they have an obligation to respond with violence. That's the motive." The prosecutor concluded that portion of his closing argument by stating, "We have the street gang allegation. So you have to find that for *all* of those charges."

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[15] The clerk's transcript indicates that the court ordered the information amended by interlineation to add a violation of section 246, as count 6. The information amended as a result, was not part of the record on appeal.

Defense counsel argued that the gang allegation should not be found true as to count 5, stating, "So while there might be a crime of shooting at an inhabited dwelling, there's no—nothing to establish the fact that it was gang related." Moving on to the allegations at issue in count 6, defense counsel stated, "Now the same thing is true of, say, shooting at Eric Delery's car. Which, by the way, as I remember the evidence, was probably around the corner at the time the shots were fired . . . . But the fact that one gang member may shoot at another gang member doesn't mean that it was done for the benefit of the gang. And that's really the point that I'm trying to make."

The jury was instructed with CALCRIM No. 1401 that if it found appellant guilty of the crimes charged in counts 1 through 6, it must then "decide whether, for each crime, the People have proved the additional allegation that [appellant] committed that crime for the benefit of, at the direction of, or in association with a criminal street gang. You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime." The jury was instructed with CALCRIM No. 3146 that if it found appellant guilty of the crimes charged in counts 1 through 6, it must then "decide whether, for each crime, the People have proved the additional allegation that [appellant] personally used a firearm during the commission of that crime."

On count 6, the jury found appellant guilty of shooting at an occupied vehicle, in violation of section 246. The jury also found true the firearm enhancements pursuant to section 12022.5, subdivision (a), and section 12022.53, subdivisions (b) and (c), and the gang allegation pursuant to section 186.22, subdivision (b)(1)(C). Appellant was sentenced to a consecutive term of 25 years to life. The court imposed a 15 year to life term for conviction of section 246, because the felony was committed to benefit a criminal street gang (§ 186.22, subd. (b)(4)(B)). With regard to the firearm enhancement, the court stated "I don't believe 12022.53 would apply" "[b]ecause there is no great bodily injury as to count 6." A 10-year firearm enhancement pursuant to section 12022.5, subdivision (a), was imposed.

B. Appellant Received Adequate Notice of the Charges

Appellant contends that the court's reliance on the alternative sentencing paradigm of section 186.22 and the imposition of a firearm enhancement pursuant to section 12022.5, subdivision (a) constituted an unauthorized sentence because neither section was included in the charge, and due process requires that he be advised of the charges against him.

Respondent argues the claim is forfeited. "'[T]he failure to demur [or object] to an indictment which does not state the particulars of an offense with sufficient clarity is a waiver of the defects [citations].' [Citation.]" (*People v. Ramirez* (2003) 109 Cal.App.4th 992, 997.) Appellant has forfeited this claim as the record does not reflect any objection by appellant in the trial court as to the adequacy of notice. (*People v. Bright* (1996) 12 Cal.4th 652, 671, overruled on another ground by *People v. Seel* (2004) 34 Cal.4th 535, 550.) In any event, appellant's contention is without merit.

The purpose of the information is to provide a criminal defendant with notice of the charges and to allow him to prepare a defense and avoid surprise. (*People v. Valladoli* (1996) 13 Cal.4th 590, 607; *People v Haskin* (1992) 4 Cal.App.4th 1434, 1438.) This means that except for a lesser included offense, a defendant cannot be convicted of an offense of which he has not been charged, even if there was evidence at trial to show that he committed the offense. (*People v. Haskin, supra*, at p. 1438.) The same rule applies to enhancements. (*Ibid.*)

The record on appeal does not contain the information amended by interlineation to include count 6. But, contrary to appellant's contention, the record before us demonstrates that appellant had adequate notice of the firearm and gang enhancements sought by the prosecution on count 6, and suffered no prejudice. Appellant and his counsel were present when an exchange took place between the trial court and the prosecutor which specifically referenced firearm and gang allegations pertaining to count 6. The court stated that the firearm allegation as described in section 12022.53, subdivision (c) applied to count 6 and provided the parties with case law which he stated

supported his decision. The prosecutor pointed out that appellant was facing a potential life term on count 6 "because the gang allegation [was] also alleged." The prosecutor stated during closing arguments that the gang allegation applied to *all* charges, and the jury was instructed concerning gang and firearm allegations pertaining to count 6. Appellant's contention is further undermined by the fact that defense counsel actually argued in closing argument that the gang allegation should not be found true as to count 6.

C. Resentencing is Required on Count 6

As noted above, the court imposed a firearm enhancement pursuant to section 12022.5, subdivision (a), but declined to impose a firearm enhancement pursuant to section 12022.53, subdivisions (b) or (c). The section 12022.5, subdivision (a) enhancement must be stricken, and remand for resentencing on count 6, consistent with this opinion is required.

Count 6 involves the interplay between section 186.22, which targets participants in criminal street gangs, and the firearm enhancement statutes pursuant to section 12022.5, subdivision (a), and section 12022.53, subdivisions (b) and (c), after appellant was convicted of violating section 246. The relevant statutes are:

Section 246

As pertinent here, section 246 describes the crime of shooting at an occupied motor vehicle as follows: "Any person who shall maliciously and willfully *discharge a firearm* at an . . . occupied motor vehicle, . . . is guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for three, five, or seven years, or by imprisonment in the county jail for a term of not less than six months and not exceeding one year." (§ 246, italics added.)

Section 186.22

Pertinent here is subdivision (b) of section 186.22 which imposes greater punishment when a crime is committed "for the benefit of, at the direction of, or in

association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).)

Most felonies committed to benefit a criminal street gang are subject to an additional prison term of two, three, or four years, at the trial court's discretion. (§ 186.22, subd. (b)(1)(A).) If the underlying crime is a serious felony, the additional term is five years (*id.,* subd. (b)(1)(B)); if the underlying felony is a violent felony, the additional term is 10 years (*id.,* subd. (b)(1)(C)).

If the felony committed to benefit a criminal street gang is "a home invasion robbery . . . ; carjacking . . . ; *a felony violation of Section 246* [the crime committed here]; or a violation of Section 12022.55" (§ 186.22, subd. (b)(4)(B), italics added), the sentence is "an indeterminate term of *life imprisonment* with a minimum term of the indeterminate sentence calculated as the greater of: [¶] (A) The term determined . . . pursuant to [the determinate sentencing law] for the underlying conviction . . . . [or] [¶] (B) Imprisonment in the state prison for 15 years . . . ." (§ 186.22, subd. (b)(4), italics added).

Section 12022.5

Section 12022.5 imposes "an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years" for those who personally use "a firearm in the commission of a felony or attempted felony" "unless use of a firearm is an element of that offense." (§ 12022.5, subd. (a).)

Section 12022.53

Section 12022.53 imposes increasingly severe sentence enhancements for those who use firearms in the commission of certain felonies listed in subdivision (a) of that section. Among those felonies is "[a]ny *felony punishable by* death or *imprisonment* in the state prison *for life*." (§ 12022.53, subd. (a)(17), italics added.) Personal use of a firearm while committing such a felony leads to an additional prison term of 10 years. (*Id.,* subd. (b).) *Personal and intentional discharge* of a firearm (as in this case) results in an additional 20-year prison term. (*Id*., subd. (c).) And for personal and intentional

discharge of a firearm resulting in death or great bodily injury, there is an additional consecutive prison term of 25 years to life. (*Id*., subd. (d).)

Here, appellant was convicted of shooting at an occupied motor vehicle (§ 246) which, by itself, is punishable by a term of three, five, or seven years in prison, at the trial court's discretion. But when that crime is committed to benefit a criminal street gang, as the jury here found, the penalty is life imprisonment, with a minimum term of no less than 15 years. (§ 186.22, subd. (b)(4).) That life term does not constitute a sentence enhancement, because it is not imposed in addition to the sentence for the underlying crime (here, shooting at an occupied motor vehicle); rather, it is an alternate penalty for that offense. (*People v. Jones* (2009) 47 Cal.4th 566, 576.) Because the felony that defendant committed (shooting at an occupied motor vehicle) was punishable by a life term under section 186.22, subdivision (b)(4) (because it was committed to benefit a criminal street gang), he committed a "felony punishable by . . . imprisonment in the state prison for life" within the meaning of subdivision (a)(17) of section 12022.53.

Because use of a firearm is an element of the section 246 offense which the jury found true, the plain language of section 12022.5, subdivision (a) ("unless use of a firearm is an element of the offense") prohibited imposition of punishment under that subdivision. (See, e.g., *People v. Kramer* (2002) 29 Cal.4th 720, 723, fn. 2 [noting Pen. Code, § 12022.5, subd. (a) enhancement does not apply if firearm use is an element of the underlying offense, thereby precluding its application to the crime of discharging a firearm at an occupied vehicle].)

At sentencing, the trial court was operating under the mistaken belief that a finding of great bodily injury was required to impose a section 12022.53 firearm enhancement. This is an actual requirement of section 12022.53, subdivision (d) only. In *People v. Jones, supra*, 47 Cal.4th 566, the court addressed whether the defendant had committed a felony punishable by life imprisonment (§ 12022.53, subd. (a)(17)), thereby triggering an additional 20-year firearm enhancement under section 12022.53, subdivision (c). (*Jones, supra,* at pp. 570–572.) It noted that section 186.22, subdivision (b)(4) constituted an

alternative penalty provision, which made the felony of shooting at an inhabited dwelling subject to life imprisonment. (*Jones, supra*, at p. 578.) In committing the shooting the defendant personally and intentionally discharged a firearm in the commission of that felony (§ 12022.53, subd. (c)); thus, imposition of the 20-year sentence enhancement of section 12022.53, subdivision (c) was proper. (*Jones, supra*, at p. 578.)

Therefore, as the trial court correctly pointed out in an exchange with counsel prior to closing arguments, the personal use and discharge of a firearm allegation pursuant to section 12022.53, subdivision (c), was applicable to count 6. As the jury found that firearm enhancement to be true the trial court must sentence appellant accordingly.

DISPOSITION

The judgment is modified to strike the four-year Penal Code section 12022.5, subdivision (a) enhancements on counts 1, 2, and 3; strike the 20-year Penal Code section 12022.53, subdivision (c), and the 10-year Penal Code section 12022.53, subdivision (b) enhancements on count 4, both of which were stayed; and strike the 10-year Penal Code section 12022.5, subdivision (a) enhancement on count 6.

The case is remanded to the trial court with instructions to: (1) impose sentence on counts 1, 2, and 3 pursuant to Penal Code sections 245, subdivision (a), and 186.22, subdivision (b)(1)(C), and the trial court may not rely on the jury finding regarding the great bodily injury allegation (§ 12022.7, subd. (a)) to determine the proper enhancements on count 1; and (2) impose sentence on count 6 pursuant to Penal Code sections 186.22, subdivision (b)(4)(B), and 12022.53, subdivision (c).

In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ